SEYEDALIREZA SEYEDHEDAYATOLLAH EHTESHAMIARDESTANI

v.

PP

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
ROHANA YUSUF JCA
TENGKU MAIMUN JCA
[CRIMINAL APPEAL NO: B-05-208-08-2012]
18 APRIL 2014

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 2,849g of methamphetamine - Appeal against conviction and sentence - Presumption of knowledge and trafficking - Failure by trial judge to determine which presumption relied upon - Whether appellant rebutted presumption - Whether amounted to a misdirection - Whether defence sufficiently considered by trial judge - Whether trial judge failed to undertake exercise under s. 182A Criminal Procedure Code - Whether conviction and sentence safe - Dangerous Drugs Act 1952, s. 37(d) & (da)*

CRIMINAL PROCEDURE: *Appeal - Appeal against conviction and sentence - Dangerous drugs - Trafficking - Presumption of knowledge and trafficking - Failure by trial judge to determine which presumption relied upon - Whether appellant rebutted presumption - Whether defence sufficiently considered by trial judge - Whether trial judge failed to undertake exercise under s. 182A Criminal Procedure Code - Whether conviction and sentence safe - Dangerous Drugs Act 1952, ss. 37(d), (da) & 39B(1)(a)*

The appellant was charged for trafficking in 2,849g of methamphetamine, an offence punishable under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). The appellant was found with a trolley bag ('P27') and a black bag ('P37') at the Kuala Lumpur International Airport. Upon examining the contents of P27, SP5 found a transparent plastic packet containing crystal-like substances suspected to be drugs concealed in P27. The trial judge made a finding that the appellant had custody and control of P27 at the end of the prosecution's case and went on to consider knowledge under the presumption of s. 37(d) of the DDA based on the appellant's suspicious conduct. The trial judge found that since the appellant had travelled from Doha to KLIA

carrying and transporting the two packets of drugs which was concealed in P27, it envisaged the act of trafficking as in s. 2 of the DDA. Since knowledge had been proven by direct evidence, the trial judge held that the presumption of trafficking could be invoked under s. 37(da) of the DDA. Having found that the prosecution had established a *prima facie* case against the appellant, the trial judge called upon the appellant to enter his defence. The essence of the appellant's defence was that P27 belonged to one Alizadeh Vahid ('Alizadeh'), another passenger on the same flight as the appellant. The appellant contended that he had checked-in the bag because he had to help Alizadeh. On arrival at the KLIA airport, Alizadeh had asked the appellant to take the bag as Alizadeh had to use the wash room. The appellant contended that he was around the airport as he was looking for Alizadeh. The trial judge held that the appellant could have picked up any names from the passenger manifest list which was handed to the defence and if the appellant's story was accepted, it would open floodgates. As such, the trial judge held that the appellant's defence was merely a bare denial and failed to cast reasonable doubt on the prosecution's case. Subsequently, the appellant was convicted and sentenced to death by the High Court. Against the conviction and sentence, the appellant appealed to the Court of Appeal. The appellant contended that in dismissing the defence of the appellant on the ground that the appellant could have picked up any name from the passenger list, the trial judge was purely speculating and had not given a fair and sufficient consideration to the defence and that the trial judge had misdirected herself in the handling of presumptions.

Held (acquitting and discharging the appellant; setting aside conviction and sentence of the High Court)

Per Tengku Maimun JCA delivering the judgment of the court:

(1) The defence of the appellant was not a simple denial. The appellant had given an explanation on how the appellant ended up with P27 and the explanation was not inherently incredible. The defence which concerned Alizadeh who was a real person ought to have been considered by the trial judge as the appellant was entitled to be acquitted on the charge of trafficking if he could show that he was a mere possessor of the drugs whilst Alizadeh was the true trafficker. Instead, the trial judge had considered matters which were not in evidence and speculated that the appellant could have picked up a

name from the passenger list. The trial judge had failed to undertake the exercise under s. 182A of the Criminal Procedure Code to evaluate all the evidence and had failed to consider the defence fairly and sufficiently. Thus, the trial judge had erred in describing the defence as a bare denial and in dismissing the defence. (paras 16 & 17)

(2) The trial judge had invoked both presumptions under s. 37(d) and (da) of the DDA in the alternative. The trial judge must make a finding as to which presumption was relied upon as there had to be a certainty as to the presumption before the defence was called. If the trial judge had resorted to the presumption in calling the defence, the law required that the trial judge applied the test of balance of probabilities in considering whether the appellant had rebutted the presumption. There was no application of the test of balance of probabilities by the trial judge. (paras 19 & 20)

(3) The approach of not electing or making a finding on which presumption was invoked but merely relying on the alternative was most undesirable. The trial judge ought to make the necessary finding of whether there was actual or presumed possession and whether it was presumed or actual trafficking. It reflected the uncertainty of the part of the trial judge. Such finding was important as it impacted the burden placed on the defence. The failure of the trial judge to make a finding as to which presumption was relied upon for possession and trafficking and the failure to consider whether the appellant had rebutted the presumption amounted to a misdirection by way of non-direction which had prejudiced the appellant. (paras 21 & 23)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah dituduh mengedar 2,849g methamphetamine, kesalahan yang boleh dihukum di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Perayu didapati membawa satu beg troli ('P27') dan satu beg hitam ('P37') di Lapangan Terbang Antarabangsa Kuala Lumpur. Setelah memeriksa kandungan P27, SP5 mendapati sebungkus plastik lutsinar yang mengandungi bahan kristal yang disyaki dadah telah disembunyikan di dalam P27. Hakim bicara telah membuat dapatan bahawa perayu mempunyai jagaan dan kawalan terhadap P27 yang mengandungi dadah di akhir kes pendakwaan dan kemudian mempertimbangkan pengetahuan di bawah anggapan s. 37(d) ADB berdasarkan

kelakuan perayu yang mencurigakan. Hakim bicara mendapati bahawa perjalanan perayu dari Doha ke KLIA sambil membawa dan mengangkut dua bungkusan dadah yang disembunyikan dalam P27 adalah tindakan pengedaran seperti yang diperuntukkan di bawah s. 2 ADB. Oleh kerana pengetahuan telah dibuktikan dengan keterangan langsung, hakim bicara telah memutuskan bahawa anggapan pengedaran boleh dibangkitkan di bawah s. 37(da) ADB. Setelah mendapati bahawa pihak pendakwaan telah membuktikan kes *prima facie* terhadap perayu, hakim bicara telah memanggil perayu untuk membela diri. Intipati pembelaan perayu adalah bahawa P27 merupakan kepunyaan satu Alizadeh Vahid ('Alizadeh'), seorang penumpang lain dalam penerbangan yang sama. Perayu berhujah bahawa Alizadeh telah meminta bantuan perayu untuk mendaftar masuk beg. Setibanya di lapangan terbang KLIA, Alizadeh meminta perayu untuk mengambil beg tersebut kerana Alizadeh terpaksa menggunakan bilik air. Perayu menegaskan bahawa dia berjalan-jalan di sekitar lapangan terbang untuk mencari Alizadeh. Hakim bicara telah memutuskan bahawa perayu boleh mengambil sebarang nama dari senarai penumpang yang telah diserahkan kepada pembelaan dan jika kenyataan perayu diterima, ia akan membuka pintu empangan. Oleh itu, hakim bicara telah memutuskan bahawa pembelaan perayu adalah penafian semata-mata dan gagal menimbulkan keraguan munasabah terhadap kes pendakwaan. Perayu kemudiannya didapati bersalah dan dihukum mati oleh Mahkamah Tinggi. Perayu telah membuat rayuan di Mahkamah Rayuan terhadap sabitan dan hukuman tersebut. Dalam rayuannya, perayu berhujah bahawa dengan menolak pembelaan perayu atas alasan bahawa perayu boleh mengambil sebarang nama dari senarai penumpang, hakim bicara telah membuat spekulasi dan tidak memberikan pertimbangan yang adil dan mencukupi terhadap pembelaan perayu dan hakim bicara telah terkhilaf dalam pengendalian anggapan.

Diputuskan (membebaskan dan melepaskan perayu; mengenepikan sabitan dan hukuman Mahkamah Tinggi)

Oleh Tengku Maimun HMR menyampaikan penghakiman mahkamah:

(1) Pembelaan perayu bukanlah penafian semata-mata. Perayu telah memberi penjelasan mengenai bagaimana perayu mendapat P27 dan penjelasannya bukanlah tidak mustahil untuk diterima. Pembelaan perayu berkenaan kewujudan Alizadeh sepatutnya dipertimbangkan oleh hakim bicara kerana perayu berhak untuk dibebaskan atas tuduhan pengedaran jika

dia dapat menunjukkan bahawa perayu adalah seorang yang punyai milikan dadah semata-mata manakala Alizadeh adalah pengedar sebenar. Sebaliknya, hakim bicara telah mempertimbangkan perkara-perkara yang tidak terkandung dalam keterangan dan membuat spekulasi bahawa perayu boleh mengambil sebarang nama dari senarai penumpang. Hakim bicara telah gagal melaksanakan amalan yang diperuntukkan di bawah s. 182A Kanun Tatacara Jenayah untuk menilai semua keterangan dan telah gagal mempertimbangkan pembelaan dengan adil dan secukupnya. Oleh itu, hakim perbicaraan telah terkhilaf dalam dapatannya bahawa pembelaan perayu adalah penafian semata-mata dan dalam menolak pembelaan perayu.

(2) Hakim bicara telah menggunapakai kedua-dua anggapan di bawah s. 37(d) dan (da) ADB secara alternatif. Hakim bicara perlu membuat keputusan yang jelas mengenai anggapan yang disandarkan kerana perlu ada kepastian terhadap anggapan yang digunapakai sebelum pembelaan dipanggil. Jika hakim bicara telah menggunapakai anggapan sebelum memanggil pembelaan, undang-undang memperuntukkan bahawa hakim bicara menggunakan ujian imbangan kebarangkalian dalam menimbangkan sama ada perayu telah menyangkal anggapan tersebut. Tidak ada sebarang ujian imbangan kebarangkalian yang digunakan oleh hakim bicara.

(3) Pendekatan untuk tidak memilih atau membuat suatu dapatan mengenai anggapan yang digunapakai tetapi bergantung semata-mata kepada alternatif adalah tidak wajar. Hakim bicara sepatutnya membuat dapatan sama ada terdapat milikan sebenar atau milikan anggapan dan sama ada pengedaran sebenar atau pengedaran anggapan digunapakai. Ia mencerminkan ketidaktentuan hakim perbicaraan. Dapatan tersebut adalah penting kerana ia memberi kesan kepada beban yang diletakkan ke atas pembelaan. Kegagalan hakim bicara membuat dapatan mengenai anggapan yang telah digunapakai untuk menentukan milikan dan pengedaran dan kegagalan menentukan sama ada perayu telah menyangkal anggapan tersebut adalah suatu salah arahan yang telah memprejudiskan perayu.

Case(s) referred to:
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
PP v. Ku Yahya Ku Bahari & Anor [2002] 1 CLJ 113 CA ***(refd)***
Yee Wen Chin v. PP & Another Appeal [2008] 6 CLJ 773 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 182A
Dangerous Drugs Act 1952, ss. 2, 37(d), (da), 39B(1)(a)

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the prosecution - Awang Armadajaya Awang Mahmud; DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 45A-82-2011]

Reported by Sandra Gabriel

JUDGMENT

Tengku Maimun JCA:

[1] The appellant was charged for trafficking in dangerous drugs to wit 2,849g of methamphetamine, an offence punishable under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act). He was convicted and sentenced to death by the High Court. Against the said conviction and sentence, the appellant has appealed to the Court of Appeal.

[2] The case for the prosecution is as follows. Whilst on a surveillance duty on 24 September 2010 at about 4.30pm at the Carousel E, Arrival Hall, Kuala Lumpur International Airport (KLIA), SP5 and his team saw the appellant looking anxious and was constantly looking at the exit door. After the appellant picked up a trolley bag (P27), he did not immediately leave the area but instead the appellant was wandering around the carousel.

[3] SP5 stopped the appellant when he was heading towards the exit. The appellant was carrying P27 and a black bag (P37). SP5 directed the appellant to the narcotics office. At the narcotics office, the appellant was examined but nothing incriminating was found on him.

[4] P27 which had the name tag of the appellant, was subsequently examined. SP5 removed some clothings from P27 after which he felt something bulging at the base of the bag. SP5 pressed his hands thereat and he felt something underneath the lining of the bag. On a close scrutiny of the bag, SP5 noticed that the lining of the bag had traces of gum. SP5 removed the lining and he found a plastic layer with rivet marks on it. When SP5 opened the plastic layer, he found a transparent plastic packet containing crystal like substances suspected to be drugs.

[5] The analysis done by the chemist (SP2) confirmed the substances found in the bag P27 to be methamphetamine weighing 2,849g, which formed the subject matter of the charge against the appellant.

[6] At the end of the prosecution's case, the learned trial judge made a finding that the appellant had the custody and control of the bag P27 that contained the drugs. The learned trial judge then went on to consider knowledge where the learned trial judge said as follows (p. 106 of the appeal record vol. 2):

> After it was proven that the Accused had custody and control of the drugs, the Prosecution is entitled to rely on the presumption under section 37(d) of the Act.
>
> Section 37(d) of the Act states that:
>
> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.
>
> However, the Prosecution also submitted that the Accused's conduct before he was arrested is relevant and consistent to show that the Accused had knowledge of the existence of the drugs. Since the Accused was "dalam keadaan mundar mandir, kelilhatan resah dan sentiasa memandang ke arah pintu keluar" and subsequently after taking the bag still "berlegar-legar" around the Carousel would infer that the Accused had knowledge of what was in the bag and was conscious of it.
>
> ...
>
> Therefore knowledge may be presumed or was proven by the Prosecution.

[7] The learned trial judge then sets out s. 2 of the Act after which Her Ladyship said:

> The Accused had concealed the drugs in the bag (P27), carrying the bag containing the drugs and travelled all the way from Doha to KLIA, transporting the drugs.
>
> ...
>
> ...

> Therefore the act of the Accused travelling from Doha to KLIA carrying and transporting the two (2) packets of drugs concealed at the base of the bag P27 is what is envisaged by section 2 of the Act for the definition of the word "trafficking". His act amounted to keeping, concealing, transporting and carrying.
>
> However, on the other hand since knowledge had also be proven by direct evidence, the Prosecution may also invoke the presumption under section 37(da) of the Act. Therefore in that scenario, trafficking can be presumed.
>
> As such, trafficking had been proven by either direct evidence or by invoking section 37(da) of the Act.

[8] Having found that the prosecution had established a *prima facie* case against the appellant, the learned trial judge called upon the appellant to enter on his defence.

[9] The essence of the defence which had also been put forth during the prosecution's case was that the bag P27 belonged to one Alizadeh Vahid, another passenger on the same flight as the appellant. The explanation given by the appellant on P27 was as follows. The appellant had checked in the bag because Alizadeh Vahid had asked him for help as Alizadeh had checked in two bags and was going to check in the third bag for which Alizadeh would have to pay for the excess weight.

[10] Before checking in the bag, Alizadeh opened the bag and the appellant saw some clothes. The appellant did not know that there were drugs inside the bag. On arrival at KLIA, Alizadeh asked the appellant to take the bag as Alizadeh was going to the wash room. The appellant was walking up and down as he was looking for Alizadeh.

[11] The learned trial judge made the following finding on the defence:

> It is not disputed that the story that the bag belonged to someone else i.e. Alizadeh Vahid is not a belated defence. It was suggested in the Prosecution Case. However, it will still have to be examined if the story is reasonable, probable or logical to cast a doubt in the Prosecution Case.
>
> On a close scrutiny of the Defence, yes, the name "Alizadeh Vahid" appears in the Passenger Manifest (P39A) which was served on the Defence under section 51A of the Evidence Act 1950 (*sic*). With that, the Defence can pick up any name and allege that the Accused was asked to check in the bag by someone else. True, adverse inference cannot be invoked against

the Accused for not calling any witness. However, it is easy to pick up a name from the passenger list and say that the bag belonged to the person by that name. Anyway, *albeit* that, as stated earlier, for the charge the Accused is facing, it is custody and control and not ownership.

If the story of the Accused is accepted, it will be easy for would be drug traffickers, just pick up a name from the passenger manifest and state that they were asked to check in the bag and thing will get away. However, as stated earlier, it's not ownership. Therefore the defence has no legs to stand over.

The other defence is that he was an innocent carrier or "momentarily holder". For this defence, there is nothing to show or relate the bag (P27) to Alizadeh Vahid.

The defence of the Accused is therefore merely a denial saying that the bag containing the drugs was not his but Alizadeh Vahid's. It is just a denial. In *D.A. Duncan v PP* [1980] 2 MLJ 195, Raja Azlan Shah, CJM (as HRH then was) said "... his denial did not cast a reasonable doubt in the Prosecution's Case against the Appellant" ...

The Appeal

[12] Before us, learned counsel for the appellant raised the following two grounds:

(i) That the learned trial judge had failed to appreciate sufficiently the defence; and

(ii) That the learned trial judge had misdirected herself in the handling of the presumptions.

Evaluation Of The Defence

[13] On the first ground, the complaint of the appellant was two-fold ie, firstly that the learned trial judge erred when Her Ladyship criticised the defence as a bare denial and secondly that the learned trial judge had failed to give a fair and just consideration of the defence case.

[14] It was submitted by learned counsel for the appellant that the defence of the appellant was not a bare denial but a defence which was not belated, coupled with an explanation together with a challenge. When the learned trial judge described the defence as a bare denial, the learned trial judge was saying that the appellant had no explanation to offer. This had caused the lost of whatever chance that was fairly opened to the appellant to secure an

acquittal. Further, in dismissing the defence of the appellant on the ground that the appellant could have picked up any name from the passenger list, the learned trial judge was purely speculating and the learned trial judge had not given a fair and sufficient consideration to the defence.

[15] To recapitulate, the defence of the appellant was that he had no knowledge of the drugs that were concealed in P27; that P27 belonged to Alizadeh; that Alizadeh had requested the appellant to check in P27 to avoid paying the charges for excess baggage and that upon arrival, Alizadeh had requested the appellant to help retrieve P27 as Alizadeh had wanted to go to the washroom.

[16] In our view, the defence of the appellant is not a simple denial. The appellant gave an explanation on how he ended up with P27 and in our judgment his explanation is not inherently incredible. The learned trial judge has therefore erred in describing the defence as a bare denial and has erred in dismissing the defence on the ground that the appellant could pick up any name from the passenger manifest to allege that he was asked to check in the bag for that other passenger. It was never put to the defence that such was the case.

[17] The defence concerning Alizadeh, who was a real person, ought to have been considered by the learned trial judge as the appellant was entitled to an acquittal on the charge of trafficking if he can show that he was a mere possessor of the drugs whilst Alizadeh was the true trafficker (see *Yee Wen Chin v PP & Another Appeal* [2008] 6 CLJ 773). The learned trial judge had failed to do so. Instead, Her Ladyship considered matters which were not in evidence and speculated that the appellant could have picked up a name from the passenger list when she concluded that "If the story of the appellant is accepted, it will be easy for would be drug traffickers, just pick up a name from the passenger manifest and state that they were asked to check in the bag and thing will get away." Clearly, the learned trial judge had failed to undertake the exercise expected of her under s. 182A of the Criminal Procedure Code ie, to evaluate all the evidence before her and evidently she had failed to consider the defence fairly and sufficiently.

The Presumptions

[18] The second ground raised by learned counsel for the appellant was on the presumptions. The complaint was not on the invocation of double presumption of possession and trafficking under s. 37(d) and (da) of the Act respectively, but the complaint was the manner the learned trial judge handled the presumptions.

[19] As borne out by the passages in the grounds of judgment quoted above, the learned trial judge had invoked both presumptions under s. 37(d) and (da) in the alternative. In this regard, the submissions of learned counsel was that the approach taken by the learned trial judge was wrong. The learned trial judge, submitted learned counsel, must make a finding as to which presumption that was relied upon as there has to be a certainty as to the presumption, before defence is called. Related to this complaint is the failure of the learned trial judge to make a ruling at the end of the defence case as to whether the appellant had rebutted the presumption.

[20] It cannot be denied that the learned trial judge had adverted to both presumptions under s. 37(d) and (da) and also to s. 2 of the Act without electing whether the appellant was found to be in actual possession of the drugs and was presumed to be trafficking under s. 37(da) or whether the appellant was presumed to be in possession of the drugs under s. 37(d) and was found to be trafficking under s. 2 of the Act. And if the learned trial judge had resorted to the presumption in calling the defence, the law requires that the learned trial judge apply the test of 'balance of probabilities' in considering whether the appellant had rebutted the presumption (see *PP v. Ku Yahya Ku Bahari & Anor* [2002] 1 CLJ 113). We find no such application of the test of 'balance of probabilities' by the learned trial judge.

[21] In our view, the approach of not electing or making a finding on which presumption that was invoked but by merely relying on the alternative, is most undesirable. It reflects the uncertainty on the part of the trial judge to make a finding. The trial judge ought to make the necessary finding ie, whether it was actual or presumed possession and whether it was presumed or actual trafficking based on the evidence before her. We are further of the view that it is important that such a finding be made as it impacts the burden placed on the defence.

[22] In this regard we echo the views of Augustine Paul J (as His Lordship then was) in the case of *PP v. Chia Leong Foo* [2000] 4 CLJ 649:

> It must first be observed that reliance on the presumption provisions where there is available evidence of the facts to be presumed will be unfavourable to the accused. This is because where the court relies on a statutory provision relating to a presumption of law like the presumption provisions it is bound to take the fact as proved until evidence to the contrary is given, on a balance of probabilities, to disprove it (see *PP v Yuvaraj* [1969] 2 MLJ 69; *Nagappan Kuppusamy v PP* [1988] 2 MLJ 53). This results in a legal burden being imposed on an accused person though it is not illegal. Failure to discharge the burden, even where a reasonable doubt as to guilt exists, will be followed by conviction (see *State v Mello & Anor* [1999] 1 LRC 215). However, if the court had acted on the available evidence in proof of the relevant ingredients without resorting to presumptions there is only an evidential burden on an accused person to raise a reasonable doubt. This indiscriminate use of presumptions when there is evidence of the facts to be presumed will be unfavourable to the accused as it will place a heavier burden on him which could have been avoided. Fairness to the accused therefore demands that the presumption provisions are used only when there is no evidence of the facts to be presumed.

[23] In the instant case, it is our judgment that the failure of the learned trial judge to make a finding as to which presumption was relied upon for possession and trafficking and the failure to consider whether the appellant had rebutted the presumption, amounts to a misdirection by way of non-direction which has prejudiced the appellant.

[24] Having found that there are merits in the grounds raised by learned counsel, we unanimously allowed the appeal. The conviction and sentence of the High Court was set aside. The appellant was acquitted and discharged.